

Internal Revenue Service  
**memorandum**

CC:TL-N-9525-89

Br4:CRGilbert

date: AUG 31 1989

to: District Counsel, Manhattan NA:MAN  
Attn: S. Katz-Pearlman

from: Assistant Chief Counsel CC:TL  
(Tax Litigation)

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subject: [REDACTED] - Expiration of Statutory Period to Assess Tax ([REDACTED]-[REDACTED])

This is in response to your August 22, 1989 request for formal tax litigation advice in the above-entitled non-docketed case. Your inquiry originated as an informal tax litigation advice, but at our request you sought formal advice so we could better reflect on the issues and coordinate and confirm Service position.

ISSUES

1. Whether the Service may retain an unassessed partial payment of tax and interest for [REDACTED] and [REDACTED], even though the period of limitation (open as to other issues on a restricted consent) has expired.
2. Whether the partial payment of tax and interest should now be assessed.

CONCLUSION

We agree with the positions in your incoming request. Because the amounts involved were paid as tax and interest within the limitations period, they should be retained by the Service. An assessment of the amounts should not be made, however, as any such assessment would be untimely.

DISCUSSION

As you are aware, Service position on the issues is reflected in Rev. Rul. 85-67, 1985-1 C.B. 501. A payment of tax and interest within the limitations period, even if not assessed (assessment would now be untimely), does not constitute an overpayment so as to entitle the taxpayer to a credit or refund. Here, the \$[REDACTED] (\$[REDACTED] tax, \$[REDACTED] interest) was paid by [REDACTED] voluntarily as partial satisfaction of its [REDACTED]-[REDACTED] tax liability.

The efficacy of Rev. Rul. 85-67 will be litigated on the Government's appeal to the Fourth Circuit in Ewing v. United States, 89-1 U.S.T.C. ¶ 9379 (W.D. N.C. 1989), appeal docketed,

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No. 89-1756 (4th Cir. June 16, 1989). Despite the misstatement of the law in Rev. Rul. 85-67, the Department of Justice has affirmed its intent to provide the Service with at least one appellate test of the continued validity of Crompton and Knowles Loom Works v. White, 65 F.2d 132 (1st Cir. 1933), cert. denied, 290 U.S. 669 (1933), which underlies the revenue ruling.

Inasmuch as [REDACTED]'s limitations period for [REDACTED]-[REDACTED] remains open on a restricted consent, care should be taken that any subsequent payments of tax and interest are properly assessed and reflected on [REDACTED]'s account, and that an overpayment is not otherwise generated on paper because of the \$[REDACTED] in tax and interest previously paid but not assessed.

If you have further need for coordination, please contact Mr. Craig R. Gilbert at FTS 566-3305.

MARLENE GROSS  
Assistant Chief Counsel  
(Tax Litigation)

By:

  
HENRY G. SALAMY  
Chief, Branch No. 4  
Tax Litigation Division